Testimony of Kenneth A. Cook

President
Environmental Working Group

Before the

Committee on Environment and Public Works
United States Senate

On

Strengthening Public Health Protections by Addressing Toxic Chemical Threats

July 31, 2013

Chairman Boxer, Ranking Member Vitter and distinguished members of the committee: I'm Kenneth A. Cook, president of the Environmental Working Group, a nonprofit research and advocacy organization based in Washington, D.C., Iowa and California.

I want to thank you, Chairman Boxer, for your leadership in organizing these panels today to discuss comprehensive reform of the Toxic Substances Control Act and for the opportunity to testify. There is widespread agreement that TSCA is broken and must be overhauled to protect public health and the environment. Today's hearing is an important step toward developing landmark legislation that will finally ensure that the chemicals to which we are all exposed in our everyday lives are safe – especially for children, our most vulnerable population.

I also want to acknowledge the loss of Senator Frank Lautenberg, widely acknowledged as the father of TSCA reform. Senator Lautenberg was a champion of consumer protection throughout his illustrious career in the United States Senate and the reform of TSCA fit perfectly with this mission. Ever since Senator Lautenberg decided to tackle this challenge nearly a decade ago he was a tireless advocate for reform, and testifying before this committee on this important issue just doesn't feel the same without him here.

For two decades, EWG has conducted research on the impact of toxic chemicals on Americans' health. Many of these toxic chemical exposures come from ordinary consumer products we all use – such as flame retardant coatings on sofa upholstery, nursing pillows, car seats, children's tents and nap mats, chemical components of nonstick cookware and stain repellents and chemicals used to make clear plastic water bottles.[1] These toxic chemicals are polluting people's bodies – our blood, our fatty tissue and even breast milk.[2]

Even more startling is the reality that toxic industrial pollution begins in the womb. In 2004 and 2009, EWG's groundbreaking research identified nearly 300 industrial chemicals in the umbilical cord blood of 20 American newborns.[3] These tests detected mercury; common fire retardants like tetrabromobisphenol A, or TBBPA, found on car seats, playpens and baby swings;[4] bisphenol A, part of

the epoxy coating inside food cans[5] and perchlorate, a rocket fuel component. We also found lead, polychlorinated biphenyls and pesticides the federal government banned more than 30 years ago – decades before these children were conceived.

Exposure to even miniscule amounts of toxic industrial chemicals matters. Studies have found that children exposed in the womb to some common pollutants display measureable learning, memory and behavior delays that persist through childhood.[6] We have seen disturbing health trends associated with toxic chemical exposures, including more birth defects in the reproductive organs of baby boys,[7] earlier puberty in girls,[8] skyrocketing rates of autism, now at 1 in 50 American children,[9] more attention deficit-hyperactivity disorder[10] and higher incidence of certain childhood cancers.[11] American pregnancies are at risk, with decreasing birth weights[12] and more newborns diagnosed with thyroid disease.[13] A growing body of scientific research has established that exposure to toxic chemicals during fetal development and childhood can permanently alter a person's health and development.[14,15]

These data, along with biomonitoring studies conducted by the federal Centers for Disease Control and Prevention,[16] raise serious concerns about the lasting effects of lifelong exposure to complex mixtures of toxic chemicals. The President's Cancer Panel declared in 2010 that the number of cancers caused by toxic chemicals is "grossly underestimated" and warned that Americans face "grievous harm" from chemicals that contaminate air, water and food.[17]

The Environmental Protection Agency has been given responsibility but little authority for enforcing the Toxic Substances Control Act. When this law was enacted in 1976, Congress grandfathered more than 60,000 chemicals already on the market. To date, the EPA has thoroughly assessed the safety of only a few hundred. By last year, the agency had targeted 83 of the grandfathered chemicals on grounds they pose high concern for human health and the environment.[18] Earlier this year, the U.S. Government Accountability Office determined that the EPA does not have enough toxicity and exposure data to assess properly 70 percent of those chemicals.[19] At its current pace, GAO said, the agency could take another decade to complete assessments of the 83 chemicals on the list.[20]

The consequences of inaction are serious. For instance, the ubiquitous fire retardant TBBPA has been on the market for more than 20 years. The U.S. chemical industry makes more than 100 million pounds of it yearly. Among its uses are consumer electronics and children's products like baby carriers, playpens, car seats and baby swings.[21] Yet this chemical was not tested for carcinogenicity until the federal government's National Toxicology Program initiated a study in 2007. The NTP's preliminary findings, made known last April, were chilling: TBBPA caused aggressive uterine cancer in female rats.[22]

The federal law's failures are not limited to existing chemicals. The EPA approves an average of 600 new chemicals per year, often without toxicity data. Thousands of chemicals in widespread use in our homes, schools and communities have not been thoroughly studied for their health implications.

The Chemical Safety Improvement Act is worse than current law

The Chemical Safety Improvement Act will not fix the problem. It would preserve some of the worst features of the Toxic Substances Control Act. And yet it would prevent states from enacting their own, more protective, regulations, and it would prevent individuals from seeking remedies through the legal system. Americans would wind up with less government vigilance over hazards posed by toxic chemicals.

Thirty-four law professors and legal experts have warned this committee that if the Chemical Safety Improvement Act becomes law, the EPA still might lack the power to ban dangerous substances like asbestos – a chemical that causes 10,000 deaths per year in this country.[23] (See Attachment A).

This proposal's safety standard is too weak. Current law and the Chemical Safety Improvement Act both require that the EPA consider the safety of a chemical against a standard of "unreasonable risk."[24] This standard assumes that the public must tolerate "reasonable" harm. The Chemical Safety Improvement Act would likely allow numerous chemicals that present some risk of harm to escape regulation. This is especially troubling given the impacts of toxic chemical pollution on vulnerable populations like pregnant women, children and workers.

Furthermore, safety assessments under this bill would be limited to "intended conditions of use."[25] The intended use and actual use of a chemical can vary widely over time.

Pesticide manufacturers have met a much higher standard set by the Food Quality Protection Act of 1996 – "reasonable certainty of no harm" – for nearly twenty years. Most Americans would agree that chemicals in consumer products should be as safe as pesticides.

The Chemical Safety Improvement Act, like current law, would require the EPA to conduct an onerous balancing of costs and benefits and analysis of alternatives before restricting the use or manufacture of a chemical. To ban or phase out a chemical, the EPA would first have to consider: the costs and benefits of the proposed regulatory action and of potential alternative actions, the costs and benefits of the chemical and alternatives to the chemical, the availability of feasible alternatives for the chemical and the risks posed by alternatives to the chemical.[26]

The Chemical Safety Improvement Act replicates numerous other deficiencies contained in current law. For example:

-- The EPA need not give special consideration to vulnerable populations such as children, workers, pregnant women and residents of so-called fenceline communities near heavy polluters. Ignoring young, weak or poor Americans and people already exposed to toxic pollution is a glaring omission.

-- Chemical companies would not be compelled to prove their chemicals are safe or even to submit a minimum amount of data to the EPA so it could assess them. The burden would fall on the EPA to show that these substances were potentially hazardous. Sometimes the agency would not have enough information to make sound decisions about chemicals.

-- The EPA could still let new chemicals on the market before determining that they were safe.

-- The EPA would not face hard deadlines to assess chemical safety.

-- Chemical companies would not have to pay reasonable fees to help defray the costs of the EPA's assessments. The taxpayers would underwrite most of the costs of chemical safety tests, and the companies would reap all the profits.

The bill's sweeping preemption provisions are deeply troubling. When the EPA cannot impose even modest restrictions on dangerous substances, others must step in. Nearly 20 states enacted chemical safety laws between 2003 and 2010, reforms supported by Democrats and Republicans alike.[27] The Chemical Safety Improvement Act would preempt existing and future state regulations.[28] Its provisions are unduly broad. In fact, the bill's preemption language is so problematic that three California state agencies have warned Congress that it could cripple state laws on everything from warning labels on consumer products to regulations that protect the public from toxic chemicals, ensure clean drinking water and curb ozone pollution.[29]

In a sweeping section entitled "Effect on Private Remedies," the bill would cast EPA safety determinations as the final word on a chemical's safety during legal proceedings.[30] By limiting the right of judges and juries to evaluate and weigh relevant evidence on the potential harm caused by toxic chemicals, the bill could significantly chill lawsuits brought by people injured by these substances. The bill's section on private remedies would grant chemical companies virtual immunity from legal actions. Once the EPA issued its determination, a judge or jury could no longer consider the issue of safety, even when subsequent evidence called into question the agency's reasoning. People who were injured would have no legal recourse. Chemical manufacturers would have few incentives to reformulate their products to make them safer.

The Chemical Safety Improvement Act is a step backward, not forward

The Chemical Safety Improvement Act lacks key reforms considered critical to improving federal toxics regulation and protecting people from dangerous industrial chemicals. We recognize that bipartisan support is essential to securing passage of a chemical safety reform bill, but meaningful bipartisan compromise on what would be the first major federal environmental law in 16 years cannot become a reality without the solid support of environmental and public health communities.

Real reform means:

A solid safety standard that protects children. Any chemical safety reform bill must give priority to the protection of children. That is why EWG advocates the "reasonable certainty of no harm" safety standard found in the Food Quality Protection Act of 1996. It would put health first, not corporate profits. A standard of "reasonable certainty of no harm" would require the EPA to consider aggregate exposure to toxic chemicals and the many routes through which people are exposed to them when determining whether a chemical is safe. The EPA would not need to base its decisions on an assessment of costs and benefits. It is this standard that enables the EPA to issue meaningful rules under the Food Quality Protection Act that truly protect children from pesticides. A reform bill's safety standard should be modeled after such a health-protective framework.

Required submission of specific chemical safety data and testing information to the EPA. Chemical companies must be required to develop and submit to the EPA enough information about existing and new chemicals to ensure a proper evaluation. A good model is Europe's REACH program. The acronym stands for Registration, Evaluation, Authorisation and Restrictions of Chemicals. The minimum data sets required of chemical manufacturers should include existing safety data, including data prepared for European, Canadian, and U.S. screening programs, and internal company evaluations. Data submitted to the EPA must be sufficiently robust to allow the agency to set priority for a chemical, decide whether the agency needs more information and make a science-based determination of its safety.

Protection of vulnerable populations. The EPA must have the authority to take quick action to regulate chemicals that are most harmful to people, particularly vulnerable populations such as children, pregnant women, elderly people, workers, communities disproportionately affected by industrial pollution and low-income communities and communities of color too often residing in highly polluted areas. Although detection of a chemical in blood or cord blood does not prove harm, the presence of industrial chemicals in the human body is evidence of health risks. Chemicals that are getting into people's bodies should be given priority for assessment and management. Previous chemical safety reform bills have given high priority for evaluation to chemicals known to be hazardous to human health, including chemicals that persist and accumulate in the human body. EWG strongly supports such measures. Chemical reform legislation must target "hot spots" of industrial pollution to ensure that the unique issues facing fenceline and other disproportionately impacted communities are fully addressed.

Safety review of new chemicals. Most Americans assume that a chemical can't be sold until proved safe. They are wrong. In fact, according to a 2010 report by the EPA Inspector General, 85 percent of the premanufacture notices chemical manufacturers had submitted to the EPA to that date did not contain any toxicity data.[31] Not all those chemicals were eventually offered for sale. Even so, it is troubling that chemical makers can sell new substances with so few hard facts about their safety.

The EPA is perennially trapped in a chemical Catch-22. It cannot demand more test data without hard evidence that a new chemical could be an unreasonable risk, and it cannot come up with such evidence without test data. This flawed process has exposed us and our children to toxic chemicals whose risks were unknown to the EPA and to the public until well after they entered the marketplace.

New chemicals must no longer be entitled to a presumption of innocence. The law should place the burden on chemical manufacturers to establish that a new chemical is safe by demanding that the EPA make an affirmative finding of safety before the substance is allowed on the market.

Preservation of states' rights to protect the public. Congress must not interfere with states' authority to fill voids left by federal law. States must have flexibility to respond to changing circumstances and the unique needs of their citizens. They must be able to tackle unforeseen chemical risks in coming years. For instance, the relatively new field of nanotechnology is producing materials that may pose risks unknown to the lawmakers who crafted the Toxics Substances Control Act during the Ford administration.[32]

Timely review and regulation of problematic chemicals. Congress must ensure that the EPA moves in a timely manner to set priorities and regulate chemicals that raise concerns for public health and the environment. The EPA must have and meet hard deadlines for progress at each step in the chemical review process. The chemical industry must pay its fair share of the costs of tests that can ensure that chemicals are safe. As with other environmental laws, courts should defer to the agency's expertise as long as it can reasonably back up its decisions.

Conclusion

We applaud the committee for its commitment to making chemical safety reform a reality. We cannot support the Chemical Safety Improvement Act in its current form, but we look forward to working with you to build broad and deep support for safe chemicals legislation that will truly protect our children's health. Thank you for the opportunity to testify. I welcome any questions you may have.

ENDNOTES

[1] E.g., Heather Stapleton et al., Identification of Flame Retardants in Polyurethane Foam Collected from Baby Products, 45 Envtl. Sci. & Tech. 5323-31 (2011), http://www.ncbi.nlm.nih.gov/pubmed21591615/; Heather Stapleton, et al., Novel and High Volume Use Flame Retardants in US Couches Reflective of the 2005 PentaBDE Phase Out, 46 Envtl. Sci. & Tech. 13432-39 (2012), http://www.ncbi.nlm.nih.gov/pubmed/23186002; U.S. Envtl. Prot. Agency, Long-Chain Perfluorinated Chemicals (PFCs) Action Plan (2009), http://epa.gov/oppt/existingchemicals/pubs/pfcs_action_plan1230_09.pdf; U.S. Envtl. Prot. Agency, Bisphenol A Action Plan (2010), http://epa.gov/oppt/existingchemicals/pubs/actionplans/bpa_action_plan.pdf.

[2] See, e.g., Jean-Philippe Antignac, et al. Occurrence of Perfluorinated Alkylated Substances in Breast Milk of French Women and Relation with Socio-Demographical and Clinical Parameters: Results of the ELFE Pilot Study 91 Chemosphere 802-08 (2013); Jean-Philippe Antignac, et al. Exposure Assessment of French Women and Their Newborn to Brominated Flame Retardants: Determination of Tri- to Deca- Polybromodiphenylethers (PBDE) in Maternal Adipose Tissue, Serum, Breast Milk and Cord Serum (2008) 157 Envtl. Pollution 164-73 (2009); Ctrs. for Disease Control and Prevention, National Health and Nutrition Examination Survey (2013), http://www.cdc.gov/nchs/nhanes.htm.

[3] EWG, Body Burden: The Pollution in Newborns (2005), http://www.ewg.org/research/body-burden-pollution-newborns and EWG, Pollution in Minority Newborns (2009), http://www.ewg.org/research/minority-cord-blood-report.

[4] J.B. Herbstman et al., Prenatal Exposure to PBDEs and Neurodevelopment, 118 Envtl. Health Perspectives 712-19 (2010), http://www.ncbi.nlm.nih.gov/pubmed/20056561.

[5] U.S. Envtl. Prot. Agency, Bisphenol A Action Plan, *supra* note 1.

[6] See, e.g., J.M. Braun et al., Impact of Early-Life Bisphenol A Exposure on Behavior and Executive Function in Children, 128 Pediatrics 873-82 (2011), http://www.ncbi.nlm.nih.gov/pubmed/22025598.

[7] N. Djakovic et al., Hypospadias, Advances in Urology Volume 2008, Article ID 650135, http://www.ncbi.nlm.nih.gov/pubmed/18989369; Jorma Toppari, et al. Cryptorchidism and Hypospadias as a Sign of Testicular Dysgenesis Syndrome (TDS): Environmental Connection 88 Birth Defects Research. Part A, Clinical & Molecular Teratology, 910-19 (2010).

[8] Frank M. Biro et al., Pubertal Assessment Method and Baseline Characteristics in a Mixed Longitudinal Study of Girls, 126 Pediatrics 583-90 (2010), http://pediatrics.aappublications.org/content/early/2010/08/09/peds.2009-3079.abstract.

[9] Stephen J. Blumberg et al., Changes in Prevalence of Parent-Reported Autism Spectrum Disorder in School-Aged U.S. Children: 2007 to 2011–2012, Nat'l Health Statistics Reports No. 65, Mar. 20, 2013, http://www.cdc.gov/nchs/data/nhsr/nhsr065.pdf.

[10] Ctrs. for Disease Control, Increasing Prevalence of Parent-Reported Attention-Deficit/Hyperactivity Disorder Among Children - United States, 2003 and 2007, 59 Morbidity & Mortality Weekly Report 1439-43 (2010), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5944a3.htm.

[11] U.S. Envtl. Prot. Agency, America's Children and the Environment (3d ed. 2012), http://www.epa.gov/ace/.

[12] N. Morsaki et al., Declines in Birth Weight and Fetal Growth Independent of Gestational Length, 121 Obstetrics & Geynecology 51-58 (2013), http://www.ncbi.nlm.nih.gov/pubmed/23262927.

[13] Katharine Harris & Kenneth Pass, Increase in Congenital Hypothyroidism in New York State and in the United States, 91 Molecular Genetics and Metabolism 268-77 (2007), http://www.sciencedirect.com/science/article/pii/S1096719207001096.

[14] Benjamin J. Apelberg et al., Determinants of Fetal Exposure to Polyfluoroalkyl Compounds in Baltimore, Maryland, 41 Envtl Sci. & Tech. 3891-97 (2007); Sally Ann Lederman et al., Relation Between Cord Blood Mercury Levels and Early Child Development in a World Trade Center Cohort, 116 Envtl. Health Perspectives 1085-91 (2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2516590/; S.K. Sagiv et al., Prenatal Organochlorine Exposure and Measures of Behavior in Infancy Using the Neonatal Behavioral Assessment Scales (NBAS), 116 Envtl. Health Perspectives 666-73 (2008), http://www.ncbi.nlm.nih.gov/pubmed/18470320.

[15] The toll of toxic chemical pollution-related illness is staggering. Leonardo Trasande of the Mount Sinai School of Medicine and Yinghua Liu at the National Children's Study have estimated that the economic impact of toxic environmental pollution on children, including parents' lost productivity, was $76.6 billion in a single year, 2008. Leonardo Trasande & Yinghua Liu, Reducing the Staggering Costs of Environmental Disease in Children, Estimated at $76.6 Billion in 2008, 30 Health Affairs 863-70 (2011), http://content.healthaffairs.org/content/30/5/863.

[16] See, e.g., Ctrs. for Disease Control and Prevention, National Health and Nutrition Examination Survey, *supra* note 2.

[17] President's Cancer Panel, 2008-2009 Annual Report: Reducing Environmental Cancer Risk: What We Can Do Now at Cover Letter (2010), http:deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp08-09rpt/Pcp_Report_08-09_508.pdf.

[18] "TSCA Work Plan Chemicals," U.S. Envtl. Prot. Agency, http://epa.gov/oppt/existingchemicals/pubs/workplans.html (last updated June 13, 2013).

[19] U.S. Gov't Accountability Office, GAO-13-249, Toxic Substances: EPA Has Increased Efforts to Assess and Control Chemicals but Could Strengthen Its Approach 18 (2013), http://www.gao.gov/assets/660/653276.pdf.

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[22] Nat'l Toxicology Program, Pathology Tables for Peer Review, TR-587: Tetrabromobisphenol A (TBBPA) (2013), http://ntp.niehs.nih.gov/?objectid=1AF3931A-FF57-C2F8-3948D37883F3B052; Audio Tape: Comments of Linda Birnbaum on Fire Safety without Harm, Included in Press Package of National Toxicology Program (Apr. 17, 2013), http://www.niehs.nih.gov/about/boards/naehsc/agenda/may2013/report_from_office_of_communications_and_public_liaison.pdf.
[23] Letter from John S. Applegate, et al. to Senator Barbara Boxer & Senator David Vitter (June 12, 2013), http://static.ewg.org/pdf/Lawyers-Letter-to-Senate-Expressing-Concerns-With-CSIA-June-12-2013.pdf.
[24] Chemical Safety Improvement Act, S. 1009, 113th Cong. § 3(16).
[25] Id. §§ 6(b)(4)(D), 6(c)(2)(A).
[26] Id. § 6(c)(9)(C), (D).
[27] Safer Chemicals Healthy Families, Healthy States: Protecting Families from Toxic Chemicals While Congress Lags Behind 6, 12 (2010), http://www.saferstates.com/attachments/HealthyStates.pdf.
[28] Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(a).
[29] See Press Release, EWG, California Environment, Law Enforcement Officials Warn Senators About Federal Chemicals Bill (June 28, 2013), http://www.ewg.org/release/california-environment-law-enforcement-officials-warn-senators-about-federal-chemicals-bill.
[30] Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(e).
[31] EPA Office Of Inspector Gen., EPA Needs a Coordinated Plan to Oversee Its Toxic Substances Control Act Responsibilities 6 (2010), http://www.epa.gov/oig/reports/2010/20100217-10-P-0066.pdf.
[32] EWG, Comments on Draft Guidance For Industry; Considering Whether an FDA-Regulated Product Involves the Application of Nanotechnology; Availability, 76 Fed. Reg. 34,715 (June 14, 2011), http://static.ewg.org/pdf/EWG-FDA-Comments-Nano-Guidance-August-2011.pdf.

ATTACHMENT A

June 12, 2013

The Honorable Barbara Boxer
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The Honorable David Vitter
Ranking Member
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Dear Chairman Boxer and Ranking Member Vitter:

The undersigned are thirty-four law professors, legal scholars, and public interest lawyers from across the country who have years of collective experience in the fields of administrative, public health, and environmental law, with a particular focus on state and federal toxics policy. We write to express serious reservations with the "Chemical Safety Improvement Act," which was introduced by Sen. David Vitter and the late Sen. Frank Lautenberg on May 22, 2013. Supporters have heralded the bill as a "historic step" toward reforming our broken framework for regulating chemicals on the market. However, for reasons explained herein, we cannot support the bill as written, which must be strengthened to fix current law and ensure that chemicals are safe for people, particularly vulnerable populations such as children.

In our expert opinion, the bill:

• Essentially preserves the same inadequate safety standard used in current law, which has been read by at least one court to require the U.S. Environmental Protection Agency (EPA) to engage in an onerous balancing of costs and benefits to justify restrictions on toxic chemicals;

• Retains the same obstructive standard of judicial review that appears in current law, which requires judges to demand substantial evidence from EPA to justify any safety determination or restriction of a chemical that poses risks to public health and the environment;

• Contains sweeping preemption language that would prevent states from enforcing existing, and adopting new, laws designed to supplement federal law in protecting people and the environment from exposures to harmful substances; and

• Takes the extraordinary step of making any safety determination by EPA dispositive on the question of whether a chemical is safe in federal and state courts. This would effectively bar judges and juries from taking into account other relevant evidence regarding the safety of a chemical, particularly new evidence developed after the determination is made.

Here are our four major concerns presented in detail:

Safety Standard. The bill defines "safety standard" as one that "ensures that no *unreasonable risk* of harm to human health or the environment will result from exposure to a chemical substance." Chemical Safety Improvement Act, S. 1009, 113th Cong. § 3(16) (emphasis added). This definition fundamentally reproduces the same safety standard found in current law.

*See*Toxic Substances Control Act § 6(a), 15 U.S.C. § 2605(a). Unlike strictly health-based standards (*e.g.*, "reasonable certainty of no harm"), laws that use "unreasonable risk" language have been interpreted to require EPA to complete a complex balancing of costs and benefits before the agency can impose a restriction on a chemical to address safety concerns. *E.g.*, John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 Ecology L.Q. 721 (2008); *see also* Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 Vand. L. Rev. 1817 (2009). Therefore, even without language in the safety standard directing EPA to restrict a chemical using the "least burdensome requirements," Toxic Substances Control Act § 6(a), 15 U.S.C. § 2605(a), by retaining the "unreasonable risk" language, the Chemical Safety Improvement Act might be read to place a heavy burden on EPA to impose even modest restrictions on a chemical. As a result, we believe that the same outcome in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) (striking down EPA asbestos ban and phaseout rule) could be possible under the safety standard proposed in this bill, particularly with the heightened judicial review discussed in the next paragraph.

Judicial Review. Courts typically use a reasoned decisionmaking standard to review agency actions, meaning they will not strike down a regulation unless an agency has acted in an arbitrary or capricious manner. *E.g.*, *Allied Local & Regional Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 77 (D.C. Cir. 2000) (EPA consideration of factors listed in statute "adequate to constitute reasoned decisionmaking"); *see also* Administrative Procedure Act, 5 U.S.C. § 706. In contrast, the Chemical Safety Improvement Act, like the Toxic Substances Control Act, would require courts to apply a heightened standard of judicial review when evaluating rules made pursuant to the bill. Specifically, courts would have to set aside rules requiring the development of more test data, safety determinations, and restrictions on chemicals unlikely to meet the safety standard if, in their opinion, EPA has not supported them with "substantial evidence." Chemical Safety Improvement Act, S. 1009, 113th Cong. § 16(2). In practice, this standard can be read to "impose[ ] a considerable burden" on EPA to develop a record that can withstand a hard look from courts, particularly when all of the other procedural hurdles in the bill are factored in. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1214 (5th Cir. 1991), quoting *Mobile Oil Co. v. Fed. Power Comm'n*, 483 F.2d 1238, 1258 (D.C. Cir. 1973).

Preemption. The Chemical Safety Improvement Act would appear to largely preempt state regulations designed to protect public health and the environment from exposure to harmful chemicals. It would preempt existing and future state regulations that: require the development of test data or information on chemicals for which companies have to submit similar information to EPA; restrict the manufacture, processing, distribution, or use of a chemical after EPA has issued a safety determination for that chemical; or require notification for the use of a chemical substance if EPA has determined that it is a significant new use that must be reported to the agency. Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(a). The bill also would prohibit states from creating new restrictions on the manufacture, processing, distribution, or use of a chemical that EPA has classified as high- or low-priority. *Id.* § 15(b). This preemption provision is sweeping in nature and raises serious questions as to whether states could even enact or continue to enforce laws that simply require companies to disclose information about chemicals to consumers or require that products carry warning labels. Numerous states have passed laws in recent years in the absence of federal regulatory action to protect the public from

toxic chemicals. *E.g.*, Safer Chemicals Healthy Families, *Healthy States: Protecting Families from Toxic Chemicals While Congress Lags Behind* (2010), http://www.saferstates.com/attachments/HealthyStates.pdf. If this bill were to become law, it would perpetuate many of the Toxic Substances Control Act's shortcomings while preventing states from protecting public health and the environment in the absence of a robust federal law — or in the case of a strong federal regulatory framework, from complementing EPA's efforts to achieve this important goal.

Private Remedies. The bill takes the extraordinary step of making a safety determination by EPA admissible in any federal or state court and dispositive as to whether a chemical substance is safe. Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(e). As a result, the bill's section on private remedies could significantly encroach on the right of judges and juries to evaluate and weigh relevant evidence regarding the potential injuries caused by toxic chemicals. In turn, this could have the effect of granting chemical companies immunity from legal actions by private parties once EPA has issued a positive safety standard determination, even when subsequent evidence calls into question the agency's reasoning.

In view of these issues, and others identified by public health and environmental groups, we believe the Chemical Safety Improvement Act preserves some of the most problematic features of the Toxic Substances Control Act, while making it harder for state and private actors to ensure the safety of chemicals in the absence of a strong federal backstop for regulating these substances. As a result, the bill, as currently drafted, takes a step backward in the protection of public health. We respectfully ask that the bill be made stronger to achieve meaningful reform of current toxics law and are available to provide substantive recommendations as needed.

Sincerely,

Note: Institutions listed for identification purposes only. The signators do not purport to represent the views of their institutions.

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